

LAURA ȘTEFAN

ANTICORRUPTION IN TRANSITION SOCIETIES

PRESA UNIVERSITARĂ CLUJEANĂ

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PRESA UNIVERSITARĂ CLUJEANĂ

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Table of Contents

List of figures	7
List of tables	8
List of textboxes	9
1. Introduction and research methodology.....	11
2. The international anticorruption framework and vulnerable areas to corruption	25
International framework.....	25
Measurement tools	33
Areas vulnerable to corruption.....	41
3. Criminal justice mechanisms to combat high-level corruption	49
Romania	55
<i>Anticorruption and the role of the intelligence services</i>	<i>73</i>
<i>The use of abuse of office and particularities of anticorruption investigations against ministers</i>	<i>77</i>
<i>Turmoil around the anticorruption agenda</i>	<i>87</i>
Moldova	93
<i>Turmoil around the anticorruption agenda.....</i>	<i>101</i>
Ukraine.....	105
<i>Turmoil around the anticorruption agenda.....</i>	<i>109</i>
Conclusions	111

4. Extraordinary mechanisms to cleanse the judiciary	119
Vetting of the judiciary	119
Serbia	123
Albania	126
Ukraine	130
Moldova	132
Conclusions	136
 5. Administrative mechanisms to prevent and combat corruption	 139
Scope of application and accessibility	141
<i>Conclusions</i>	168
Supervision, control and sanctions	173
<i>Conclusions</i>	202
 6. Conclusions	 209
 Acknowledgement.....	 223
Bibliography	225
Annex: List of interviews.....	243

List of figures

Figure 1: Democracy Index (2010 – 2021).....	34
Figure 2: Bertelsmann Transformation Index (2012-2022).....	35
Figure 3: Index of Economic Freedom (2017-2022).....	36
Figure 4: Nations in Transit (2012-2022)	37
Figure 5: Index of Public Integrity (2015-2021)	38
Figure 6: Ease of doing business	39
Figure 7: Corruption Perception Index (2012-2021)	39
Figure 8: Basel AML Index (2012-2021).....	40
Figure 9: WJP Rule of Law Index (2011-2021)	41
Figure 10: Key figures of the Romanian National Anti-corruption Directorate (2007-2021)	66
Figure 11: The evolution of immediate imprisonment sentences out of the total number of convictions in Romania	70
Figure 12: Financial implication of the high-level corruption investigations in Romania	72
Figure 13: Key figures for the criminal investigation activity of the Moldovan National Anticorruption Centre on criminal cases.....	97
Figure 14: Key figures on the activity of the Moldovan Anticorruption Prosecution Office.....	100
Figure 15: Outcome of anticorruption cases in Moldova	101
Figure 16: Number of procedures verified by PREVENT in Romania	196

Figure 17: Number of integrity warnings issued by PREVENT yearly in Romania.....	196
Figure 18: Value of procedures in which warnings were issued by PREVENT in Romania.....	196
Figure 19: Key figures regarding the performance of the Romanian National Integrity Agency up to the end of 2021	198
Figure 20: Types of liability (reflecting the views of the author).....	214

List of tables

Table 1: Key figures on the activity of the Moldovan Criminal Asset Recovery Office.....	97
Table 2: Key figures regarding the activity of the Albanian Independent Qualification Commission.....	130
Table 3: Key figures of the Appeal Chamber of Albania.....	130
Table 4: Key figures regarding the assets declaration system in Latvia	155
Table 5: Declarations of private interests in Lithuania	157
Table 6: Declaration of private interests of top executive officials in Lithuania.....	158
Table 7: Key figures regarding the activity of the French High Authority for the Transparency of Public Life	178
Table 8: The financial allocations for the system of management of financial disclosures in Latvia (2012-2016).....	183
Table 9: Sanctions applied by the Lithuanian State Tax Inspectorate	185
Table 10: Key figures regarding the activity of the Moldovan National Integrity Agency.....	190

Table 11: Typologies of Romanian officials in the findings that remained final.....	199
Table 12: The budget of the Romanian National Integrity Agency	199
Table 13: Budget of the Corruption Prevention Commission of Slovenia	200

List of textboxes

Textbox 1: Content of the declaration of assets in Bulgaria	143
Textbox 2: Public officials that submit declarations of assets and interests in France.....	145
Textbox 3: Content of the declaration of assets in France	145
Textbox 4: Public officials that submit declarations of assets and interests in Georgia	148
Textbox 5: Public officials that submit declarations of assets and interests in Latvia	152
Textbox 6: Content of the declaration of assets and interests in Latvia	153
Textbox 7: List of declarants for whom the declaration of assets is published automatically in Lithuania	156
Textbox 8: Assets to be declared in Lithuania.....	156
Textbox 9: Content of the declaration of wealth and personal interests in Moldova	159
Textbox 10: The declarants of wealth and interests in Moldova	160
Textbox 11: List of declarants submitting declarations of assets and interests in Romania	161

Textbox 12: Content of the declaration of assets and incomes in Serbia	164
Textbox 13: List of declarants in Slovenia.....	165
Textbox 14: Content of the declaration of assets in Slovenia	167
Textbox 15: Additional information Bulgaria	175
Textbox 16: Article 432-12 of the French Criminal Code	180

1.

Introduction and research methodology

Corruption is an ancient phenomenon that comes in many shapes and forms from petty corruption encountered in the everyday experiences of people with police, health or education, to systemic corruption that is engrained in the functioning of public systems, and to political corruption. In the Program of Action against Corruption the Council of Ministers of the Council of Europe acknowledges that “no precise definition of corruption can be found which applies to all forms, types and degrees of corruption, or which would be accepted universally as covering all acts, which are considered in every jurisdiction as constituting corruption” (Committee of Ministers of the Council of Europe, 1995, p. 14). A wide definition of the concept of corruption has been provided by the World Bank in 1997 “the abuse of public office for private gain” (World Bank, 1997, p. 8). Transparency International defines corruption as “the abuse of entrusted power for private gain” covering also corruption in the private sector and through its work attempts to unveil the links between the existence of corruption and democratic erosion and stagnation in economic development. This definition has been challenged by scholars by bringing into the theoretical debate the distinction between legal and illegal corruption, where legal corruption is “arising when the elite prefers to hide corruption from the population” or “investments in legal barriers” (Kaufmann, Vincente, 2005, p. 4).

The World Bank differentiates between various types of corruption: grand and petty corruption, isolated and systemic corruption, political and bureaucratic corruption, public sector and private sector corruption (World Bank 1997, pp. 8-12). A distinct specie of corruption is shown to be the theft of state assets or of governmental financial resources (World Bank 1997,

p. 10). Scholars define corruption “an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs” (Rose-Ackerman) or “the sale by government officials of government property for personal gain” (Shleifer, Vishny, 1993). The World Bank points out that bribery is only one shape under which corruption presents itself. Bribes facilitate access to government contracts or benefits, and can trigger preferential treatment in terms of taxation. Bribes oil the system to obtain licenses to operate monopolies or to expedite interaction between the state and the private sector. Bribes may also be used to deter the application of sanctions by the state to individuals or companies that are in breach of their legal obligations (World Bank, 1997, p. 9).

Preventing and combating corruption is now a recurrent theme in negotiations between governments and international institutions in the context of accession to various structures, the granting of credit or the promotion of investment. Investors demand a predictable economic environment in which corruption is kept to a reasonable level. Financial institutions are reluctant to provide financial support to countries where corruption is thriving, and inter-state organisations are reluctant to include countries that come with a serious baggage of systemic corruption. States are being asked to fight this scourge, but few have considered how this should be done in practice, how sequence interventions and how long it takes to achieve results.

Corruption is increasingly on the public agenda in countries in transition. By its very nature, transition facilitates the transfer of significant public resources into the hands of a group with preferential access to information and public decision-making. Also inherent in transition is the weakness or absence of institutions that ensure checks and balances in democracies and of the capacity or the willingness of the state to enforce its own rules. Fukuyama distinguishes between:

- **Modern** states: these are “impersonal, treating people equally on the basis of citizenship not their personal relation to the ruler.”
- **Patrimonial** states: these “are the personal property of the ruler” and “there is no distinction between the personal interests of the rulers and the public interest.”

- **Neo-patrimonial** states: these “pretend to be modern polities but in fact constitute rent-sharing kleptocracies run for the benefit of the insiders. They can co-exist with democracy producing widespread patronage and clientelism in which politicians share state resources with networks of political supporters” (Fukuyama, 2015, p. 13)

Modern democracies or states rest on **three essential pillars: the state, the rule of law and democratic accountability** (Fukuyama, 2015, p. 12). The state holds “the legitimate monopoly of coercive power over a territory”, has law-enforcement and service-providing capacities and extensive functions in the area of defence. All functions of the modern state are performed in accordance with rules that reflect the values of the society and apply equally to all citizens (including the elite). Democratic accountability ensures that the government rules the country in the public interest, rather than in the interest of the powerful few and is usually achieved through regular and free election.

While pure patrimonial states have become a thing of the past, many countries struggle to undergo full transition from neo-patrimonial states to modern states. **Neo-patrimonial states** are not by definition non-democratic. **Democracy** can co-exist with this stage of state development and in these cases the result is **widespread patronage and clientelism in which politicians share state resources with networks of political supporters** (Fukuyama, 2015, p. 13). Collier sees corruption as being concentrated in pockets: “in particular industries, in particular societies, in particular times”. The author argues that though honesty and corruption are highly persistent phenomena a turning of the tide is possible and it did happen in countries like Britain in the 19th by “closing off the major opportunities to corruption and making working for the public good more prestigious and satisfying than abusing office for private gain” (Collier, 2016, pp. 22-23).

Many of the countries in Eastern Europe are somewhere on the path between neo-patrimonial states and modern states and it is this transition and the role anticorruption policies may play in it that is at the core of the present research. Fukuyama shows that in the development of modern liberal democracies the democratic element of the equation is often the first

to be achieved. The real struggle begins in ensuring the rule of law and the performance of state functions to the standard expected by the citizens (Fukuyama, 2015, p. 13). In a 2015 study Collier and Hoeffler argue that normally governments that ensure good economic performance increase their chances of being re-elected, but when elections are not free and fair the discipline of accountability breaks down (Colliers, Hoeffler, 2015). In countries where democratic development preceded state reform the result has often been widespread clientelism (Fukuyama, 2015, p. 17). This is also the case of Eastern-Europe where the transition started with countries opening up to democracy and holding elections that were less and less criticised by external observers. Post-revolutionary social enthusiasm and the lack of any direct democratic experience of the people have made these societies an easy prey for the past elite that transformed overnight and chameleon-like presented itself to the public in the shape of new political parties. Governance practices remained elite-oriented and access to resources was restricted to a network of well-connected individuals. Along the same lines as Fukuyama, Diamond argues that **leaders in neo-patrimonial states are “eroding checks and balances, hollowing out institutions of accountability, override term limits and normative restraints, and accumulating power and wealth for themselves and their families, cronies, clients and parties”** (Diamond, 2015, p. 149). Quality of governance has been placed in connection with democracy, the control of corruption, rule of law and economic development (Holmberg, Rothstein, Nasiritousi, 2009, p. 135).

Chayes warns that systemic high-level corruption plants the **seeds of public discontent** fuelling social uprising, revolutions and radicalisation. While traditionally corruption is seen as a consensual phenomenon where parties in the corrupt transaction are relatively satisfied with the outcomes, Chayes argues that corruption fuels social frustration by humiliating the victim who lacks appropriate recourse against corrupt actions. The complexity of the corruption networks and the huge amounts of money that are being stolen are further elements that contribute to societal uprising. (Chayes, 2016, pp. 68-69). In Europe public discontent spurred street protests that centred on

demands to tackle corruption and widespread misuse of public resources. The free flow of public funds into private pockets has been seen as a threat to the well-being of the nations and as a factor undermining for the capacity of the state to provide public services that are timely and of a satisfactory standard.

Corruption functions as a means to an end allowing the users to bypass the official rules and to get access to public goods or perform prohibited activities (for example organised crime or theft from the public budgets). Klitgaard captures this idea well: “corruption is an economic crime, not a crime of passion. Givers and takers of bribes respond to incentives and punishments” (Klitgaard 2015, p. 37). Corruption is always a tool used either to gain access to public money or to buy state protection when illicit activities are carried out. When analysing anticorruption policies, we cannot ignore the specifics of the country to which they are applied, the regional context, and the existence or absence of violent responses from those targeted by investigations.

To limit the impact corruption has on governance many strategies have been employed – from enacting laws on freedom of information and citizen participation in decision-making processes, to transparency rules on procurement, to the introduction of rules on financial disclosure of assets and interests of public officials, to rules regarding the transparency and control of funding of political parties and electoral campaigns, to the setting up of specialised law enforcement agencies (including prosecutors’ offices) and sometimes of specialised courts to tackle high-level corruption. Yet the impact and the sustainability of these efforts have been uneven.

This book will explore the process of development and implementation of anticorruption policies by assessing the role of national and international stakeholders, the triggers for reform, the mechanisms that exist at international level to monitor developments in this field and their respective limitations. Anticorruption being a highly political reform the book will discuss also the interplay between the political leadership, the administration, the judiciary, the law enforcement, the intelligence services, the media and civil society.

The main research objective is to explore how the **anticorruption agenda** can become an **intrinsic part of the modernisation process** in transition societies and with this in mind what should be **the correlation should be between anticorruption and rule of law principles**.

The book is **structured** in the following chapters:

1. Introduction
2. The international anticorruption framework and vulnerable areas to corruption
3. Criminal justice mechanisms to combat high-level corruption
4. Extraordinary measures to cleanse the judiciary – the vetting process
5. Administrative mechanisms to prevent and combat corruption
6. Conclusions

In **the first chapter** the main ideas presented in the relevant academic literature are reflected and connections are made between them and the areas of research covered by this book. This chapter also includes the research objective, the research questions, the methodology employed to conduct the analysis, as well as a brief overview of the structure of the book.

In the second chapter the author takes stock of the existing legal and institutional frameworks for anticorruption, including the interaction at international level between various jurisdictions in the context of monitoring and evaluation. Some of the democracy, rule of law and anticorruption indexes are presented and discussed in this chapter. Also, a brief overview of particular areas vulnerable to corruption is made in order to better understand where there are loopholes that allow for procedures to be derailed and for well-positioned groups to benefit to the detriment of the public good and what are the best tools to address these challenges. Public procurement and clientelism in investment funding in Eastern Europe are among these areas. In some of these processes corruption is a inbuilt element, while in other areas the policy goal of fighting corruption must be correlated with other policy goals such as ensuring a healthy environment in which political pluralism can develop. In some of these fields, for example in the management of investment funding, excessive politisation of decisions is one

way to ensure that the national leadership of political parties in power maintain an upper hand in relation to the local level political leadership which in turn is main vehicle for vote gathering. In public procurement, administrative discretion must be kept at a reasonable level and there is a strong need to create an equal playing field for business to access public funds. An interesting example concerns the international standards for the financing of political parties. In this field a very subtle equilibrium between several values must be achieved in order for a control mechanism to work properly while fostering pluralism and democracy. While the temptation of anticorruption experts is to argue for the introduction of strong verification tools and harsh sanctions, the international standards are built around the principle of ensuring political freedom: the control mechanism should not be entirely subordinated to the government and the most severe sanctions for breaching the rules should only be applied exceptionally. Democracy and political pluralism are prioritised over the effectiveness of the control mechanism - a control mechanism managed by the representatives of the main parties is inherently incorporating a negotiation element which may lead to less severe sanctions. A very interesting discussion therefore arises about the hierarchy of values that are protected.

The third chapter looks into the criminal law mechanisms to combat high-level corruption, in particular the specialised anticorruption institutions established by three countries in various stages of transition: Romania, Moldova and Ukraine. The chapter builds on Fukuyama's idea of the point where the tide turns in anticorruption policies. He argues this is question of the capacity of the state to effectively enforce the law, including against the political elite: "it is impossible to control corruption [...] if nobody goes to jail" (Fukuyama, 2015, p. 13). Transparency efforts will improve governance and become mainstream in the way the state operates only if there is a widespread understanding in society that deviation from the norm will be promptly sanctioned: "Contemporary efforts to promote good governance through increased transparency and accountability without incorporating efforts to strengthen enforcement power are doomed to fail in the end" (Fukuyama, 2015, p. 19). Lagarde also stresses the same

point: “without effective law enforcement institutions [...] even the most robust legal framework will be ineffective” and warns about the risk of corruption permeating and compromising the law enforcement institutions in highly corrupt societies. In such cases “bridging institutions” such as specialised anticorruption bodies may be more effective in tackling corruption (Lagarde, 2016, p. 183). Klitgaard argues that for policies to bring corruption under control they need to focus on reducing monopoly, limiting and clarifying the extent of political and administrative discretion, increasing accountability, introducing of reform incentives and ethics reform (Klitgaard, 2015, p. 38). In countries where corruption is widespread the punishment of high-profile offenders, the refreshing of the public sector with newcomers and the pursuit of policies that can show rapid results should be at the centre of the anticorruption drive (Klitgaard, 2015, p. 39-40).

The fourth chapter explores the experiences with extraordinary evaluation processes of judges and prosecutors in four countries in transition: Serbia, Albania, Moldova and Ukraine. While this is an extreme cleansing measure that is at odds with judicial independence and stability in judicial offices, in recent years the Venice Commission has in recent years acknowledged the fact that widespread judicial corruption and links between the criminal world and the judiciary may render the vetting of judges necessary. The chapter explores the practices in the four countries to distil the essential requirements for a proper vetting process and to explore the challenges these countries faced while implementing this process.

The fifth chapter explores the practices of administrative mechanisms to prevent and combat corruption in twelve diverse jurisdictions. Seven are European Union member states (two are from the “old” EU (France and Spain), three acceded in 2004 (Latvia, Lithuania and Slovenia), two acceded in 2007 (Romania and Bulgaria)) and five are in various stages of engagement with the European Union (Bosnia and Herzegovina, Georgia, Moldova, North Macedonia, Serbia). This book also explores the role of assets and interests disclosure mechanisms. In recent years more and more countries have implemented such systems. A 2017

study produced by the World Bank showed that 161 countries have introduced, albeit with variable success, financial disclosure systems, following the path opened by the United States of America after the Watergate affair (Rossi, Pop, Berger, 2017, p. xi). The systems of assets and interests disclosure in selected Eastern European countries are presented and in the analysis compared with similar systems that have already operated for some time in more established democracies. The research in the chapter regarding assets and interests disclosure systems was built upon an analysis of primary data collected in 2017 under the auspices of the OECD/ACN Secretariat. A detailed tailor-made questionnaire was employed to collect data from competent national agencies from various national jurisdictions. This analysis was complemented by extensive desk research to ensure that the information presented is up to date and accurate as of August 2022.

The final chapter is devoted to conclusions. Since the capacity of the state to enforce the law is central to the performance of anticorruption policies it is important to reflect on how the state perform this important function in order for it to be a contributing factor to societal modernisation rather than yet another tool used by autocratic leaders to tighten their grip on the state. We argue that the action of enforcement of the law must be conducted in full compliance with rule of law standards. In other words, the state should follow its self-imposed standards and may not be allowed to depart from them even when it attempts to catch and sanction those who break the law. Absent rule of law and democratic standards anticorruption campaigns risk being derailed and politically used to silence opposition and foster the power of the incumbents. To achieve this, proper checks and balances must be in place to ensure that rules are upheld by those entities that are entrusted to ensure that corrupt officials are sanctioned properly and in a timely way. The fact that Eastern Europe has to fight corruption, including at the highest level, concomitantly with the reform of the legal and institutional framework of the countries and with the internalisation of rule of law principles presents a challenge and at the same time an opportunity.

Throughout the analysis the following **research questions** are in the background:

- What is the role of international partners in promoting good governance and strengthening anticorruption mechanisms?
- How can accession processes to various international bodies be used to promote the modernisation agenda?
- What can be learnt from the experience of the European Union enlargement processes?
- When it comes to fighting high-level corruption, the first to be affected if the policy implementation is successful are the most powerful people in that society - politicians, businessmen, senior officials. In these circumstances they are the first formal or informal opponents of such reforms. How can reformers be supported?
- What is the correlation between various types of responsibility for integrity breaches?
- What are the mechanisms to ensure that the anticorruption agenda is not used to eliminate political competitors?
- What can be done to cure widespread judicial corruption?
- How can assets and interests' disclosure regimes contribute to increasing overall transparency in the public sector and repairing trust in the public service?
- What is the role civil society and the media play in changing societal patterns and pushing for accountability?

The research methodology employed for this study includes both a quantitative and a qualitative analysis, as well as **a comparative approach**. The **quantitative analysis** refers to secondary data analysis of information that can be retrieved from various sources such as reports of relevant anticorruption institutions, evaluation reports issued by national and international stakeholders, including various indexes designed to evaluate the evolution in democratic processes, compliance with rule of law principles or efficiency of anticorruption reforms. The picture that results from this quantitative analysis **does not tell the entire story**; for many years international evaluation bodies have spoken about the need to go beyond

bare numbers and to see if anticorruption institutions truly address the most significant challenges in particular societies: if they fight high-level, political corruption, or instead resort to investigations of petty corruption that generate an appearance of good statistics. To address this limitation a **qualitative analysis** has been added to the research regarding the information gathered by the author from relevant stakeholders involved in anticorruption at national and international level. The author's professional career includes more than fifteen years of advisory services in the area of anticorruption and judicial reforms working primarily with countries in transition that struggle to achieve success in these fields. This career path has allowed the author to have solid contacts with anticorruption and judicial stakeholders of countries in South-Eastern Europe and through direct discussion, roundtables and conferences the author was able to collect direct experiences of successes and failures, of positive evolutions and steep regression, of tensions between the need to perform in anticorruption and the need to uphold the highest standards in rule of law.

Throughout the duration of the doctoral studies the author has conducted numerous interviews and focus groups with key stakeholders in a series of public and closed events presented in the annex 1. The key stakeholders include professionals with an anticorruption background both from countries in transitions such as Romania, Georgia, Moldova, Ukraine, Armenia and from established democracies such as Italy and Spain. Their profiles such as:

- judges,
- prosecutors,
- representatives of judicial councils,
- representatives of investigative or prosecutorial bodies specialized on anticorruption
- members of the Parliament,
- representatives of the ministries of justice,
- representatives of asset recovery offices,
- representatives of independent agencies managing declarations of assets and interests,

- representatives of contracting authorities and of public procurement oversight institutions,
- public procurement specialists,
- representatives of electoral authorities,
- representatives of political parties,
- representatives of civil society,
- representatives of the media and investigative journalists.

Some of these reflection opportunities allowed for a frank dialogue also with representatives of international organizations such as the European Commission, the European Parliament, the Council of Europe, EUROPOL, the US Marshals Service, and representatives of embassies.

In addition to the interviews and focus groups reflected in annex 1, the author also conducted together with the co-author of the “Piercing the Veil: Using Peer Reviews in the Fight Against Corruption - A Guide for Transforming Analysis Into Action” twenty interviews **between November 2020 and April 2021 in with professionals working in anticorruption from various backgrounds: international institutions, international development officials, civil society groups** (for a detailed list of interviewees please see Mason, Stefan, 2021, p. 73).

In October 2017 the author was part of the French “Personnalité d’avenir” program and in this capacity has spent one week in Paris having interviews with top officials from the Court of Cassation, the French Senate, the High Authority for the transparency of the public life, the French Agency for Anticorruption, the specialised prosecution office for economic and financial large scale crime, the ministry of justice, the ministry for Europe and foreign affairs, the civil society, and the academia. The interviews focused on topics such as the impact of corruption and populism on rule of law and democracy, the civil control of intelligence services, the mandate for wiretappings for criminal investigation purposes, the role of the anticorruption agenda foreign policy of France with regard to non-EU countries of South-Eastern Europe and the French position in the European Union on issues related to anticorruption, judicial reform and rule of law.

The qualitative analysis tells the story that lies behind the quantitative data and **sheds light on the most problematic questions in this field as to the relationship between anticorruption and the rule of law principles as part of the state modernisation process.** Through a **comparative approach** the reform paths and the anticorruption measures taken by the countries in focus will be assessed against each other and, where relevant, against the practices of established democracies.

The analysis in this book has a number of **limitations.** The issue of anticorruption in transition societies is multi-layered and too broad to be covered exhaustively in a single research effort. The author has **narrowed down the scope of the analysis to three distinct tools** that are used to fight high-level and widespread corruption: specialized anticorruption bodies in the criminal law area, the extraordinary process of vetting judges and prosecutors and the administrative mechanisms for disclosing and verifying assets and interests of public officials. In each chapter the relevant practice of **various countries in transition from South-Eastern Europe** is presented in a comparative manner. Where relevant the comparison includes experiences from **established democracies.** The purpose of the comparison is to distil common or different challenges countries encounter on the state transformation path and the manner in which the anticorruption policies may contribute to the process. **The list of countries covered differs between the chapters.** The author has **selected** the countries based on the **relevance** of the **particular national experiences for the subject matter covered in each chapter.** Other criteria were also employed such as the **availability of information** and the professional experience the author had in particular jurisdictions. Despite these limitations, the author trusts that the book offers an in-depth and relevant analysis of various national experiences of countries in transition in promoting the anticorruption agenda as a part of the larger modernisation process.



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